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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

**MIRALBA CASTRO ROSAS,
MIMI SANTA CRUZ, ADEL
DOGON, CHRISTOPHER
ODMAN AND ROBERT
BOUCHARD, INDIVIDUALLY
AND ON BEHALF OF ALL
SIMILARLY SITUATED
INDIVIDUALS,**

Plaintiffs,

vs.

**MACY'S, INC., MACY'S WEST
STORES INC., and
DOES 1-10 inclusive**

Defendants.

Case No. 2:11-cv-07318-PSG-PLA
Honorable Philip S. Gutierrez

**DEFENDANTS'
MEMORANDUM OF POINTS
AND AUTHORITIES IN
OPPOSITION TO PLAINTIFFS'
MOTION TO REMAND**

**[Declaration of John S. Curtis and
Supplemental Declaration of Ann
Munson Steines filed concurrently
herewith]**

Hearing Date: 11/28/2011
Hearing Time: 1:30 p.m.
Courtroom: 880 Roybal

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1 On September 6, 2011, Defendants timely removed the instant action
2 to the United States District Court for the Central District of California
3 pursuant to the Class Action Fairness Act. Plaintiffs now challenge the
4 sufficiency of Defendants' removal on a single ground—diversity of
5 citizenship. Although Plaintiffs' own Complaint affirmatively alleges that
6 both Defendants' principal place of business is Ohio (Complaint, ¶¶ 10-11),
7 after removal, Plaintiffs now argue that Defendants' principal place of
8 business is California. Plaintiffs assert that Defendants' Notice of Removal
9 is deficient on two grounds (presumably in the alternative)—(1) that
10 Defendants failed to submit sufficient "proof" to establish the principal place
11 of business for the two corporate defendants and (2) that the facts submitted
12 by Defendants to establish their principal place of business are "incredible"
13 (*i.e.* false). *See* Plaintiffs' Motion to Remand, 3:13-15. ("Defendants' notice
14 of removal fails. . . [as it is] based on incredible factual assertions and
15 speculative legal conclusions").

16 Plaintiffs' Motion fails to raise a legitimate basis for remand.
17 Defendants satisfied the requirements for removal. The Declaration of Ann
18 Munson Steines submitted in support of Defendants' Removal clearly
19 establishes that the two corporate defendant entities in this matter are not
20 citizens of California. Indeed, although Plaintiffs dispute the sufficiency of
21 her Declaration, Plaintiffs then appear to concede its sufficiency by
22 challenging the truthfulness of Ms. Steines' statements. But other than
23 unsubstantiated allegations as to their truthfulness, Plaintiffs have not
24 submitted any admissible evidence to contradict them. Lest there be any
25 doubt, Defendants herewith submit a Supplemental Declaration of Ann
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1 Munson Steines expounding on the factual statements set forth in her
2 original Declaration.¹

3 **1. Defendants Satisfied Their Legal Burden for Removal**

4 The Class Action Fairness Act provides—

5 "[t]he district courts shall have original jurisdiction of any civil
6 action in which the matter in controversy exceeds the sum or
7 value of \$5,000,000. . . and is a class action in which . . . any
8 member of a class of plaintiffs is a citizen of a State different
9 from any defendant. . ."

10 28 U.S.C. § 1332(d)(2). Pursuant to 28 U.S.C. § 1332(c)(1), "a corporation
11 shall be deemed to be a citizen of any State by which it has been
12 incorporated *and of the State where it has its principal place of business.*"
13 [emphasis supplied]

14 The U.S. Supreme Court recently resolved a circuit split regarding the
15 interpretation of a corporation's "principal place of business" as follows:

16 ". . . we conclude that the phrase 'principal place of business'
17 refers to the place where the corporation's high level officers
18 direct, control, and coordinate the corporation's activities."

19 *The Hertz Corporation v. Melinda Friend*, 130 S. Ct. 1181, 1186 (2010).
20 Referred to as the "nerve center" test, the Supreme Court further noted that
21 "the 'nerve center' will typically be found at a corporation's headquarters,"
22 *i.e.*, the corporate "brain." *Id.* at 1186, 1193. As a result, under the nerve
23 center test, a corporation is not a "citizen" of every state in which they do
24 business. *Id.* at 1193-94. Rather, as the Supreme Court explained, even if
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27 ¹ Defendants provided most of this explanatory detail during the course of
28 their meet and confer correspondence with Plaintiffs. *See* Declaration of
John S. Curtis, ¶ 3 and Exhibit B.

1 "[f]or example, [] the bulk of a company's business activities
2 visible to the public takes place in New Jersey, while its top
3 officers direct those activities just across the river in New York,
4 the 'principal place of business' is New York."

5 *Hertz*, 130 S. Ct. at 1194.

6 The burden of proof for establishing diversity jurisdiction is on the
7 party asserting it; and, when challenged, the party must support its
8 allegations with "competent proof." *Id.* at 1194-95. According to the
9 Supreme Court, "the mere filing of a form like the Security and Exchange
10 Commission's Form 10-K listing a corporation's 'principal executive offices'
11 would [not], without more, be sufficient proof to establish a corporation's
12 'nerve center.'" *Id.* at 1195. However, the Court did suggest that the
13 unchallenged declaration submitted by Hertz would have been sufficient. *Id.*

14 The citizenship of parent and subsidiary corporations is determined
15 separately where there is no showing of an alter ego relationship². *Danjaq*,

16
17 ² Plaintiffs include a vague statement in their Motion to Remand that
18 "Macy's West Stores, Inc. appears to be the corporate alter ego of the
19 West District/Division of Macy's, Inc. which operates over 257
20 department stores in the West, including 138 in California, and
21 maintains a headquarters and several offices in California."
22 Plaintiffs' Motion to Remand, 11:19-25. Plaintiffs' vague and unsupported
23 allegation falls far short of the requisite showing for the alter ego doctrine.
24 In addition, the unsubstantiated "facts" set forth by Plaintiffs are
25 questionable. First, there is no such corporate entity called "West
26 District/Division of Macy's, Inc." See Supplemental Declaration of Ann
27 Munson Steines ("Suppl. Steines Decl."), ¶ 23. Second, Macy's West Stores,
28 Inc. does not "maintain[] a headquarters . . . in California." Suppl. Steines
Decl., ¶ 24. It is true that Macy's West Stores, Inc. operates department
stores in California, but Macy's West Stores, Inc. also operates department
stores in Oregon, Washington, Idaho, Montana, Wyoming, Utah, Nevada,
Arizona, Colorado, New Mexico, Hawaii, Guam and two department stores
in Texas. Supple. Steines Decl., ¶ 25. But even if Macy's West Stores, Inc.
only operated department stores in the state of California, as the *Hertz* Court

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1 *S.A. v. Pathe Communications Corp.*, 979 F.2d 772, 774-776 (9th Cir. 1992).
2 There is no attribution rule. *Id.* Thus, in a suit against a subsidiary, courts
3 look only at the subsidiary's state of incorporation and principal place of
4 business. *Id.* Its parent's citizenship is not considered in determining the
5 subsidiary's place of business. The same holds true for suits against a
6 parent. The courts look only at the parent's state of incorporation and
7 principal place of business. *Id.* Its subsidiary's citizenship is not
8 considered.

9 In order to effectuate removal, a party must file a Notice of Removal
10 that contains "a short and plain statement of the grounds for removal" and is
11 signed under Rule 11. A Notice of Removal is sufficient "if it alleges that
12 the parties are of diverse citizenship and that the matter in controversy
13 exceeds, exclusive of interest and costs, the sum specified by 28 U.S.C. §
14 1332." *See Ellenburg v. Spartan Motors Chassis, Inc., et al.*, 519 F.3d 192,
15 200 (4th Cir. 2008) [brackets omitted] (holding that it was inappropriate for
16 the district court to have required a removing party's notice of removal to
17 meet a higher pleading standard than the one imposed on a plaintiff in
18 drafting an initial complaint). The liberal notice pleading rules governing
19 pleadings as set forth in Federal Rule of Civil Procedure ("FRCP") 8(a)
20 likewise apply to a Notice of Removal. *Id.*

21 Plaintiffs argue that Defendants failed to satisfy the liberal notice
22 pleading standard set forth in FRCP 8(a). For support, Plaintiffs selectively
23 quote from *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). Plaintiffs'

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26 explained, the fact that "the bulk of a company's business activities visible to
27 the public" are located in a particular state does not automatically make that
28 state the corporation's principal place of business. Rather, it is the state from
which those business activities are "directed" that constitutes the principal
place of business. *Hertz*, 130 S. Ct. at 1194.

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1 Motion for Remand, 5:13-6:8. In *Twombly*, the Court was faced with a case
2 in which the plaintiffs sought to represent

3 "a putative class of at least 90 percent of all subscribers to local
4 telephone or high-speed Internet service in the continental
5 United States, in an action against America's largest
6 telecommunications firms (with many thousands of employees
7 generating reams and gigabytes of business records) for
8 unspecified (if any) instances of antitrust violations that
9 allegedly occurred over a period of seven years."

10 *Id.* at 559. The complaint alleged "parallel conduct" but included only a
11 "conclusory allegation of agreement at some unidentified point." *Id.* at 557.
12 After noting that parallel conduct alone could simply be the result of
13 independent action, the *Twombly* Court held that to state a claim under § 1 of
14 the Sherman Act "requires a complaint with enough factual matter (taken as
15 true) to suggest that an agreement was made." *Id.* at 556. In other words the
16 Court said, "we do not require heightened fact pleading of specifics, but only
17 enough facts to state a claim to relief that is plausible [rather than simply
18 conceivable] on its face." *Id.* at 570. Thus, with that context, the Supreme
19 Court dismissed the Plaintiffs' Complaint because it failed to allege facts
20 sufficient to establish a "plausible" suggestion of conspiracy. *Id.* at 566.
21 Simply using the words "conspiracy" and "agreement" were not sufficient.

22 Plaintiffs argue that Defendants violated the *Twombly* principles in
23 their Notice of Removal—urging that Defendants' statements constitute a
24 "formalistic recitation" and mere "legal conclusions couched as a factual
25 allegation." Plaintiffs' Motion for Remand, 6:3-4; 9:1-4. However,
26 Plaintiffs' arguments seriously mischaracterize the substance of Defendants'
27 submissions. Using virtually the same words as those set forth in Plaintiffs'
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own Complaint (*see* Complaint, ¶¶ 10-11), Defendants affirmatively alleged their states of incorporation and principal places of business as follows:

"Defendant Macy's, Inc. is incorporated under the laws of the state of Delaware and has its principal place of business either in the state of Ohio or the state of New York. (Declaration of Ann Munson Steines, ¶ 2) Defendant Macy's West Stores, Inc. is incorporated under the laws of the state of Ohio and has its principal place of business in either the state of Ohio or the state of New York. (*Id.* at ¶ 3)."

Notice of Removal, 3:15-21. Moreover, importantly, Defendants also submitted the unchallenged declaration of a senior Macy's executive in support of these substantive allegations. *See* Declaration of Ann Munson Steines, ¶¶ 1-3, filed concurrently with Defendants' Notice of Removal. Plaintiffs might have had an argument if Defendants had simply alleged with no support, declaration or otherwise, that "they are not citizens of California" with no other explanation or affirmative allegation as to their states of citizenship. However, here, Defendants satisfied their burden under FRCP 8(a) by providing factual allegations and a sworn declaration to establish their citizenship.

Indeed, Defendants' jurisdictional allegations dovetail precisely with those suggested for use by the FRCP. As the *Ellenburg* Court noted, the forms set forth in the Appendix of Forms to the FRCP provide guidance on the level of specificity required by FRCP 8(a) as it relates to jurisdictional allegations. 519 F.3d at 200. Form 7(a) (Statement of Jurisdiction) instructs (in uncannily similar terms to those used by Defendants) that the following "form" allegation would suffice—

"a. (*For diversity-of-citizenship jurisdiction*). The plaintiff is [a citizen of Michigan] [a corporation incorporated under the

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laws of Michigan with its principal place of business in Michigan]. The defendant is [a citizen of New York] [a corporation incorporated under the laws of New York with its principal place of business in New York]. . . "

Indeed, FRCP 84 (Forms) directs that the Appendix Forms "suffice under these rules" and "illustrate the simplicity and brevity that these rules contemplate." Accordingly, as the "burden [for a removing party] is no greater than is required [for a plaintiff] to establish federal jurisdiction as alleged in a complaint" (*Ellenburg*, 519 F.3d at 200), Defendants' allegations met (through their allegations which effectively mirror those set forth in FRCP Form 7(a)) and exceeded (through the Declaration of Ann Munson Steines) those required by FRCP 8(a).

2. Defendants Are Not Citizens of California

Apparently in the alternative, Plaintiffs also argue that even if Defendants' factual allegations are deemed sufficient, they (and the supporting statements set forth in Steines' sworn declaration) are "incredible" (*i.e.*, false) because of apparent statements taken from what they identify only as "Macy's Inc.'s corporate web site." Motion to Remand, 9:15-22; 10:2-4. Plaintiffs are further critical that Ms. Steines' declaration did not include certain information they claim is "required" by *Hertz* (although *Hertz* absolutely does not "require" the information Plaintiffs contend). Motion to Remand, 11:6-18.

Plaintiffs' assertions are baseless. First, all of the statements made in Ms. Steines' sworn declaration are absolutely truthful. The unsubstantiated commentary from Plaintiffs simply reflects their lack of understanding (despite Defendants' attempts to educate during the meet and confer process). Second, although Ms. Steines' original Declaration is certainly sufficient as a matter of law for purposes of establishing that Defendants'

principal places of business are not California, Defendants herewith submit a Supplemental Declaration from Ms. Steines to lay the issue to rest.

a. Defendant Macy's, Inc.'s Principal Place of Business Is Either Ohio or New York

With respect to Defendant Macy's, Inc., in her original Declaration Ms. Steines declared the following--

"Defendant Macy's Inc. is incorporated in the state of Delaware and its principal place of business and its employees work in either the state of Ohio or the state of New York."

Steines Decl., ¶ 2. Plaintiffs find her statement to be "incredible" because, according to Plaintiffs, "Macy's Inc.'s corporate web site alleges that Macy's employs over 166,000 individuals, including 29,100 in California, 22,800 in New York and 8,500 in Ohio." (Motion to Remand, 9:16-20) Plaintiffs go on to allege that they along with all member of the "putative class" are actually employed by Macy's, Inc. in California. *Id.* at 9:20-22.

However, consistent with Ms. Steines' original Declaration, Defendants explained during the course of the meet and confer process that—

"Macy's, Inc. is solely a holding company and [] it only employs Terry Lundgren (the CEO of Macy's businesses) and his assistants. All of these individuals work either in Cincinnati, Ohio or New York, New York."

Exh. B to Curtis Declaration; *see also* Suppl. Steines Decl., ¶ 9, 13. Thus, contrary to their belief, Plaintiffs are *not* employees of Macy's, Inc. Suppl. Steines Decl., ¶ 13, 25 In her Supplemental Declaration, Ms. Steines further explains that in addition to its only employees working in either Ohio or New York, Macy's, Inc.'s corporate offices are located in Ohio and New York, it is only qualified to do business in Ohio and New York (not

California), its board of directors meets in either Ohio or New York, the members of its executive management team are located in either Ohio or New York, and with the exception of one individual, its other principal corporate officers are also located in either Ohio or New York. Suppl. Steines Decl., ¶¶ 11-13, 15-17. Accordingly, the decisions of the board of directors, executive management team and corporate officers (the individuals responsible for directing, controlling and coordinating the activities of Macy's, Inc.) are rendered from either Ohio or New York. *Id.* at ¶ 18. Given Ms. Steines' explanations, there is no question that Macy's, Inc.'s principal place of business is either in Ohio or New York, but certainly not in California.

3. Defendant Macy's West Stores, Inc.'s Principal Place of Business Is Either Ohio or New York

With respect to Defendant Macy's West Stores, Inc., in her original Declaration Ms. Steines declared the following—

"Defendant Macy's West Stores, Inc. is incorporated in the state of Ohio and its principal place of business and corporate headquarters is located in either the state of Ohio or the state of New York (where the majority of Macy's senior executive officers oversee and direct the operations of the company)."

Steines Decl., ¶ 3. Plaintiffs complain that Ms. Steines' Declaration is "ambiguous" and that it does not provide the "competent proof" required by *Hertz*.

However, consistent with Ms. Steines' original Declaration, Defendants explained during the course of the meet and confer process that--

". . . the vast majority of the company's senior executives – who determine the company's business strategies, set the company's policies and procedures, and control the company's real estate,

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1 construction activities, merchandising direction, store operations,
2 credit procedures, and the like – work out of either Ohio or New
3 York. Indeed, the company's executives in California are responsible
4 for simply executing the directions provided by, and the policies and
5 procedures set by, the executives in Ohio or New York."


6 Exh. B to Curtis Declaration. Ms. Steines further explains in her
7 Supplemental Declaration that, although Macy's West Stores, Inc. is
8 responsible for the operation of the Macy's department stores located in
9 California, it is also responsible for the operation of Macy's stores in
10 Oregon, Washington, Idaho, Montana, Wyoming, Utah, Nevada, Arizona,
11 Colorado, New Mexico, Hawaii, Guam and two stores in Texas, its
12 corporate headquarters is located in Ohio, the principal corporate officers
13 responsible for making decisions that direct the company's business
14 strategies, set the company's policies and procedures and coordinate and
15 control the company's direction with respect to areas such as real estate,
16 construction activities, merchandising, store operations, credit procedures,
17 human resources and marketing are located (with only one exception in
18 Georgia) in Ohio and New York. Suppl. Steines Decl. ¶¶ 24-28.
19 Accordingly, Macy's West Stores, Inc. principal place of business is in either
20 Ohio or New York.

21 **4. Conclusion**

22 In their Complaint, Plaintiffs agreed that Defendants' principal place
23 of business was not in California. Although they changed their position after
24 removal, Defendants provided the "competent proof" necessary to establish
25 that they are not citizens of California. As a result, this Court properly has
26 jurisdiction of this matter under the Class Action Fairness Act and Plaintiffs'
27 Motion to Remand should be denied.

28 //

1 Dated: November 7, 2011 LAW OFFICES OF JULIA AZRAEL

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3 By: 
4 JOHN S. CURTIS
5 Attorneys for Defendants
6 Macy's, Inc. and
7 Macy's West Stores Inc.
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